RECORD AND BRIEFS

No. 16-1498

FILED
JUL 17 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

BRIEF *AMICUS CURIAE* OF THE STATES OF IDAHO, KANSAS, NEBRASKA, NORTH DAKOTA, SOUTH DAKOTA, AND WYOMING IN SUPPORT OF PETITIONER

LAWRENCE G. WASDEN
Attorney General
STEVEN L. OLSEN
Chief of Civil Litigation
CLAY R. SMITH
Counsel of Record
Deputy Attorney General
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Email: clay.smith@ag.idaho.gov

Counsel for Amicus Curiae States

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

DEREK SCHMIDT
Attorney General
State of Kansas

DOUG PETERSON
Attorney General
State of Nebraska

WAYNE STENEHJEM
Attorney General
State of North Dakota

MARTY JACKLEY
Attorney General
State of South Dakota

PETER K. MICHAEL
Attorney General
State of Wyoming

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* STATES 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. THE PETITION PRESENTS AN OPPORTUNITY FOR THIS COURT TO REAFFIRM THE NEED FOR "EXPRESS" FEDERAL LAW EXEMPTING TRIBES OR THEIR MEMBERS FROM APPLICATION OF NONDISCRIMINATORY STATE LAW WHEN OFF RESERVATION 5

II. THE WASHINGTON SUPREME COURT'S INTERPRETATION OF THE YAKAMA TREATY'S RIGHT-TO-TRAVEL PROVISION NOT ONLY CONFLICTS WITH THE NINTH CIRCUIT'S INTERPRETATION BUT ALSO PRESENTS A SIGNIFICANT QUESTION OVER PROPER APPLICATION OF THE INDIAN CANONS THAT THIS COURT SHOULD RESOLVE 11

III. THE SCOPE OF THE RIGHT-TO-TRAVEL PROVISION IN THE YAKAMA TREATY HAS PRACTICAL AND LEGAL SIGNIFICANCE FAR BEYOND THE CONTROVERSY HERE 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Arizona Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999) 3

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 5

Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) 9

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) 15

Choctaw Nation v. United States, 318 U.S. 423 (1943) 15

County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 683 (1992) 6, 7, 8, 10

Cree v. Flores, 157 F.3d 762 (9th Cir. 1998) 12, 13

Cree v. Waterbury, 78 F.3d 1400 (9th Cir. 1996) 20

King Mountain Tobacco Co. v. McKenna, 768 F.3d 989 (9th Cir. 2014) 13, 14

King Mountain Tobacco Co. v. McKenna, No. CV-11-3018-LRS, 2013 WL 1403342 (E.D. Wash. Apr. 5, 2013) 14

Kiowa Tribe v. Mfg. Techns., Inc., 523 U.S. 751 (1998) 7

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) ..... *passim*

Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014) 7

TABLE OF AUTHORITIES – Continued

Page

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1975) 19

Montana v. Blackfeet Tribe, 471 U.S. 759 (1985) 10

Navajo Tribal Util. Auth. v. Arizona Dep't of Revenue, 608 F.2d 1228 (9th Cir. 1979) 19

Nw. Bands of Shoshone Indians v. United States, 324 U.S. 335 (1945) 15

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) 1, 7, 9, 18

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) 7

Organized Vill. of Kake v. Egan, 369 U.S. 60 (1962) 6

Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) 15

Osceola v. Florida Dep't of Revenue, 893 F.2d 1231 (11th Cir. 1990) 19

Ramsey v. United States, 302 F.3d 1074 (9th Cir. 2002) 17

Tulee v. Washington, 315 U.S. 681 (1942) 6, 10

United States v. Smiskin, 487 F.3d 1260 (9th Cir. 2007) 13

Wagnon v. Prairie Band of Potawatomi Nation, 546 U.S. 95 (2005) 1, 7

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 15

TABLE OF AUTHORITIES – Continued

Page

Yakama Indian Nation v. Flores, 955 F. Supp. 1229 (E.D. Wash. 1997), *aff'd*, 157 F.3d 762 (9th Cir. 1998) 11, 12, 13, 17, 19

STATUTES

25 U.S.C. § 348 7

25 U.S.C. § 349 8

25 U.S.C. § 465 7

28 U.S.C. § 1341 19

25 Stat. 642 9

INDIAN TREATIES

Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 (1846) 9

Treaty With the Flatheads, July 16, 1855, 12 Stat. 975 (1859) 18

Treaty With the Nez Perces, June 11, 1855, 12 Stat. 958 (1859) 18

Treaty With the Yakama, June 9, 1855, 12 Stat. 951 (1859) ..... *passim*

RULES

S. Ct. R. 37.2 1

S. Ct. R. 37.4 1

INTEREST OF *AMICUS CURIAE* STATES[1]

In *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995), this Court recognized legal incidence as "'a reasonably bright-line standard'" in determining challenges by a tribe or a tribal member to a state tax. But legal incidence constitutes only the starting point by identifying *who* the taxpayer is. As the Court explained in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005), the *where* of the tax – *i.e.*, whether the legal incidence attaches inside or outside Indian country – has equally "significant consequences." That is so because "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). Here, no dispute exists about the "who" or the "where." The taxpayer is Respondent, a Yakama Nation member-owned corporation, while the legal incidence of the Washington motor fuels tax concededly attached when Respondent's contractor entered the state outside the Yakama Indian Reservation with fuel purchased in Oregon. The dispute thus narrows down to a single question: Does the right-to-travel provision in Article III of the 1855 Treaty with the Yakama Nation embody the requisitely "express federal law to the contrary" that

---

[1] Under S. Ct. R. 37.2, counsel of record for all parties received notice at least ten days prior to the due date of this brief of *amici curiae*'s intention to file it. Neither consent nor leave of Court is required under S. Ct. R. 37.4.

prevents application of the Washington statute to Respondent?

The *amicus curiae* States have a straightforward interest in that question being answered definitively. This is not a parochial controversy affecting only one State and one tribe or its members. First, other tribes with identically-worded 1855 treaty provisions have reservations in Idaho and Montana. Second, the right-to-travel provisions in these treaties extend to "*all* public highways." [Emphasis added.] They thus have a preemptive radius of potentially expansive geographical range. Finally, the Washington Supreme Court has given the Yakama treaty provision an interpretation that transforms a right to use public highways for travel purposes into an exemption from state authority to impose taxes or fees on trade conducted *via* highway or, by logical extension, any activity associated with the highway use. This interpretation conflicts with decisions from the Ninth Circuit Court of Appeals dealing with the same treaty language and misapplies the Indian canons of construction. That misapplication, if followed by other courts, will prevent or significantly complicate the enforceability of not only fuel taxes but also other tax laws. These considerations plainly warrant granting *certiorari*.

SUMMARY OF THE ARGUMENT

This Court recognizes the necessity of "reasonably bright-line standard[s]" for the efficient administration of federal and state tax laws to determine their applicability to Indians. *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999). Two complementary standards control the outcome here – one tailored specifically to revenue-generating laws, and the other sweeping across the broad range of state regulation but initially announced in a taxation context. Both reflect the importance of a tax's legal incidence. Within Indian country set aside for their occupancy, tribes and tribal members possess immunity from state taxation whose legal incidence falls upon them absent Congressional consent. Once a tribe or its members leave Indian country set aside for their occupancy, the rule flips; *i.e.*, they become subject to nondiscriminatory, generally applicable state law unless "express federal law to the contrary" says otherwise. *Mescalero Apache Tribe*, 411 U.S. at 148-49. Together, these rules mean that courts in taxation cases must resolve where the tax's legal incidence attaches and whether the requisite federal law authorization or prohibition exists.

The present dispute comes to this Court only as to the second of those inquiries. The parties agree that the legal incidence of Washington's motor fuels tax attached to Respondent upon the fuel's importation into the state and outside the Yakama Reservation. The right-to-travel provision in Article III of the 1855 Treaty constitutes the sole "express federal law to the contrary" proffered to exempt Respondent from the

Washington tax's application. However, neither the provision's literal language nor the extensive treaty negotiation analysis in prior federal court litigation supports this reliance. The Washington Supreme Court's holding instead conflicts with Ninth Circuit decisions addressing claims predicated on the Article III right to travel and, more fundamentally, rests on an interpretation that misapplies Indian canons of construction.

The Washington court's misreading of the right-to-travel provision has legal and practical significance far beyond Washington State boundaries or motor fuel taxes. Isaac Stevens, then Superintendent for the Washington Territory, negotiated a series of treaties with Pacific Northwest and Intermountain tribes during 1854 and 1855, including two with Idaho and Montana tribes that contain right-to-travel language identical to the first paragraph in Article III. The decision below therefore directly invites adoption of business models like Respondent's by members of those tribes. Equally important, the Article III provision secures to the several tribes and their members "the right . . . to travel upon all public highways." No need existed in this case to resolve the exact geographical reach of "all public highways," but it plainly has a scope beyond the boundaries of Idaho, Montana and Washington and, if not simply assigned its literal meaning, portends complex and resource-depleting litigation over the treaty parties' understanding concerning the scope and nature of the highway right. Finally, disputes over the application of the Yakama right-to-travel provision have arisen in a variety of taxation

and other contexts involving a tribal member's off-reservation use of the public highway system for commercial purposes. Leaving in place the current uncertainty over the provision's proper interpretation will increase the likelihood of continued attempts to escape application of state law comparable to Respondent's activity here and impede the States' ability to fashion appropriate legislative responses.

ARGUMENT

I. THE PETITION PRESENTS AN OPPORTUNITY FOR THIS COURT TO REAFFIRM THE NEED FOR "EXPRESS" FEDERAL LAW EXEMPTING TRIBES OR THEIR MEMBERS FROM APPLICATION OF NON-DISCRIMINATORY STATE LAW WHEN OFF RESERVATION

Substantial symmetry exists with respect to on- and off-reservation application of state tax law to Indian tribes and their members. Although this Court has "not established an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of congressional consent" with respect to on-reservation conduct, "[i]n the special area of taxation of Indian tribes and tribal members, we have adopted a *per se* rule." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 & n.17 (1987). This distinction flows from the fact that "the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is

correspondingly weak" – making it "unnecessary to rebalance these interests in every case." *Id.* at 215 n.17; *see also County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 683, 688 (1992) ("And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear.'").

The Court has set in place a corresponding, if broader, *per se* rule subjecting tribes and their members to nondiscriminatory state law once they leave their reservations. *See Organized Vill. of Kake v. Egan*, 369 U.S. 60, 75 (1962) ("State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation. It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country. . . . Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, . . . in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in *Tulee* [*v. Washington*, 315 U.S. 681 (1942)] to fishing within a reservation.") (citations omitted).

This Court succinctly synthesized earlier decisions on off-reservation state authority in *Mescalero Apache Tribe*, a case involving challenged application of New Mexico gross receipts and compensating use taxes to an off-reservation tribal ski resort located on federal land. There, the Court found that Section 5 of the Indian Reorganization Act of 1934 ("IRA"), 25

U.S.C. § 465 – which exempts "any lands or rights acquired" under the IRA by the United States on behalf of a tribe or Indian from state and local taxation – provided the requisite "express federal law to the contrary" to preempt application of compensating use tax imposed on ski lifts permanently affixed to tribally leased land but not the gross receipts tax on income generated from the resort's operation. 411 U.S. at 155-59. The Court has adhered to *Mescalero Apache Tribe*'s formulation of off-reservation state authority. *E.g.*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) (state gaming law); *Kiowa Tribe v. Mfg. Techns., Inc.*, 523 U.S. 751, 755 (1998) (contract enforcement); *Chickasaw Nation*, 515 U.S. at 462-64 (income tax imposed on tribal members domiciled off reservation with respect to Indian country tribal employment); *see also Wagnon*, 548 U.S. at 112-13 (rejecting application interest-balancing test applied to on-reservation taxation of non-members engaged in commercial transactions with tribes or their members to non-Indian fuel distributor where the tax incidence arose off reservation); *cf. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (distinguishing *Mescalero Apache Tribe* based on the status of trust land as Indian country with respect to imposition and collection of cigarette tax on sales to tribal members).

This Court has rarely found the express-federal-law exception to exist in the state taxation context. In *County of Yakima*, it held Section 5 of the General Allotment Act of 1887 ("GAA"), 25 U.S.C. § 348, and GAA

Section 6, as amended by the 1906 Burke Act, *id.* § 349, authorizes imposition of state *ad valorem* taxes on reservation land patented in fee to tribal members. 502 U.S. at 263-64 ("Thus, when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes. [¶] The Burke Act proviso . . . made this implication of § 5 explicit, and its nature more clear. . . . [T]he proviso reaffirmed for such 'prematurely' patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes.").[2] It followed *County of Yakima* in *Cass*

---

[2] Section 6, as amended by the Burke Act, provides:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the former Indian Territory.

County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998), where it unanimously upheld imposition of county property taxes on reservation land that had been conveyed in fee under the Nelson Act, Act of Jan. 14, 1889, ch. 24, 25 Stat. 642, and eventually reacquired by the resident tribe. *Id.* at 115 ("When Congress makes Indian reservation land freely alienable, it manifests an unmistakably clear intent to render such land subject to state and local taxation."). Other than the compensating use tax in *Mescalero Apache Tribe*, the Court has never held preempted a state tax imposed on a tribe or tribal member where the legal incidence attached off reservation.[3]

---

[3] This Court did *reject* in *Chickasaw Nation* the argument that the Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 (1846), provided the requisitely express federal law exemption with respect to taxing the income of tribal members residing outside, but employed within, Indian country. The members relied upon a provision that secured to the tribe " 'the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants . . . but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all [such] laws. . . .' " 515 U.S. at 465. The Court made short work of the argument, looking to the treaty's unambiguous text:

> By its terms, the Treaty applies only to persons and property "within [the Nation's] limits." We comprehend this Treaty language to provide for the Tribe's sovereignty within Indian country. We do not read the Treaty as conferring supersovereign authority to interfere with another jurisdiction's sovereign right to tax income, from all sources, of those who choose to live within that jurisdiction's limits.

Id. at 466.

Mescalero Apache Tribe, *County of Yakima* and *Cass County* make plain that the term "express" – or its alternative formulation of "unmistakably clear" (*Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)) – demands, if not explicit language removing otherwise extant off-reservation taxing authority, a treaty or statutory provision whose application necessarily precludes the exercise of that authority. *See, e.g.*, *Tulee*, 315 U.S. at 685 ("[T]he state is without power to charge the Yakimas a fee for fishing. . . . We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the 'usual and accustomed places' cannot be reconciled with a fair construction of the treaty."). The Washington court did not apply that stringent standard. Indeed, other than a perfunctory nod to *Mescalero Apache Tribe* at the beginning of its legal analysis (Pet. 4a), the majority opinion paid no discernible heed to the necessity of an "express" – as opposed to a judge-made conclusion drawn from laboriously wrought treaty construction – exemption from state law. The Washington Supreme Court's decision thus charts a course that finds no precedent in this Court's application of the "express federal law" exception and calls for *certiorari* review.

II. THE WASHINGTON SUPREME COURT'S INTERPRETATION OF THE YAKAMA TREATY'S RIGHT-TO-TRAVEL PROVISION NOT ONLY CONFLICTS WITH THE NINTH CIRCUIT'S INTERPRETATION BUT ALSO PRESENTS A SIGNIFICANT QUESTION OVER PROPER APPLICATION OF THE INDIAN CANONS THAT THIS COURT SHOULD RESOLVE

A. Petitioner presents a detailed discussion of the conflict between the Ninth Circuit's and the Washington Supreme Court's reading of the Article III right-to-travel provision. Pet. 13-24. The *amicus* States concur in that analysis. However, they believe that two points bear emphasis.

First, the Washington court correctly concluded from the record made in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), *aff'd*, 157 F.3d 762 (9th Cir. 1998), that "[*t*]*ravel* was woven into the fabric of Yakama life in that it was necessary for hunting, gathering, fishing, grazing, recreational, political, and kinship purposes" and that "at the time, the Yakamas exercised free and open *access* to transport goods as a central part of a trading network running from the western coastal tribes to the eastern plains tribes." Pet. 7a (emphasis added); *see Yakama Indian Nation*, 955 F. Supp. at 1238-40. The *Yakama Indian Nation* findings reflect why the treaty parties included "the right, in common with citizens of the United States, to travel

upon all public highways": travel outside the reservation set aside under Article II of the treaty was necessary for the Nation and its members to carry on their traditional trade and subsistence practices.

But even a casual review of *Yakama Indian Nation*'s summary of the tribe's pre-treaty practices reveals nothing that suggests that either the federal or the tribal negotiators intended to reserve in Article III's *first* paragraph a right to trade or engage in usufructuary activities. Had parties so intended, that paragraph plainly would have incorporated a reference to such activities. The Article instead addresses location-related reserved rights in the *second* paragraph – all of which involve subsistence practices.[4] The Washington court's analysis additionally stripped the *Yakama Indian Nation* findings from the challenged regulatory context – truck license and overweight permit fees – that directly conditioned lawful use of the vehicles being used to travel. *See Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998) ("We agree with the district court that,

---

[4] The second paragraph reads:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Treaty With the Yakama, June 9, 1855, art. III, 12 Stat. 951, 953 (1859).

in light of those and its other findings, the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use."). So, for example, nothing in the *Yakama Indian Nation* decision or its affirmance in *Cree v. Flores* suggests that a tribal member would be immune from paying a sales tax on meals or beverages purchased off reservation while hauling logs to a mill for processing.[5] The Washington Supreme Court's reasoning proves too much.

Next, the Washington court's analysis of *United States v. Smiskin*, 487 F.3d 1260, 1279 (9th Cir. 2007), and *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 996 (9th Cir. 2014), is similarly flawed. Pet. 9a-14a. *Smiskin* found that the treaty right-to-travel precluded application of a state law that made transportation of unstamped cigarettes within Washington by persons other than licensed wholesalers unlawful unless the state liquor control board received prior notice. 487 F.3d at 1263. Although reaching a highly questionable result, the Ninth Circuit panel nonetheless tied the involved illegality – the absence of

---

[5] Although not at issue in this case, the *amicus* States see nothing in the *Yakama Indian Nation* treaty history findings to support the proposition that state gas or diesel taxes could not be imposed on tribal or tribal member vehicles for off-reservation purchases where the legal incidence falls upon the consumer. Those taxes derive from discretionary decision-making on the tribe's or a member's part; *i.e.*, the State does not require them to purchase the fuel off reservation any more than it requires them to purchase food or drink at a highway convenience store. But that type of tax at least has some relationship to the means of transportation. The taxes here do not.

pre-notification – to the treaty right; *i.e.*, the pre-notification requirement conditioned the tribal member's right to use the public highways lawfully. *Id.* at 1266 ("Tribal members were not required to notify anyone prior to transporting goods to market at the time of the treaty, and the Treaty guaranteed to them the same rights today."). *King Mountain Tobacco* runs counter to the Washington Supreme Court's treaty interpretation, since it specifically held that Article III does not create a right to trade. 768 F.3d at 998 ("there is no right to trade in the Yakama Treaty"). Contrary to the majority opinion's apparent understanding (Pet. 13a), moreover, the tribal member-owned company shipped the involved goods (unblended tobacco) from the reservation for processing and then shipped the blended product back to the Yakama Reservation in its own trucks. *Id.* at 991; *see also King Mountain Tobacco Co. v. McKenna*, No. CV-11-3018-LRS, 2013 WL 1403342, at *2, *7 (E.D. Wash. Apr. 5, 2013) (describing King Mountain Tobacco's business model and extensive off-reservation contacts with North Carolina for tobacco blending). *King Mountain Tobacco*'s Article III analysis turned not on the absence of the company's use of public highways in its commercial activities but on the absence of any restriction under the challenged state tobacco regulation on the right to use those highways. A critical difference exists, in short, between denying access to the public highway system and burdening through taxation or other regulatory measures activity that occurs in connection with use of that system. Here, the challenged law does not restrict the Respondent's right to travel on Washington public

highways; it simply requires Respondent, like any other motor fuel distributor, to pay a tax upon "first receipt" of fuel in the state.

B. More fundamentally, review of the Washington Supreme Court's decision is warranted because it misapplied the Indian canons of construction. They instruct that "treaties with Indians must be interpreted as [the Indians] would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). The canons have ancient lineage, tracing back at least to Justice M'Lean's concurring opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832). This Court nevertheless has recognized that "the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty." *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945). Consistent with that admonition, "courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' . . . clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985); *see also Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943) ("But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.").

The off-reservation right-to-travel provision in Article III of the Yakama treaty must be read *in pari materia* with the preceding portion of the first paragraph

and the second paragraph. The treaty parties unambiguously limited the exchange of promises in the first to road- or highway-related matters. The tribe accepted the Government's right to establish roads "for the public convenience" through the reservation – to which the tribe otherwise had exclusive occupancy rights under Article II[6] – but reserved (1) "the right of way, free access to the nearest public highway" from the reservation and (2) "the right, in common with citizens of the United States, to travel upon all public highways." The second paragraph then identified the other Article III rights reserved to the tribe under the treaty – *i.e.*, the exclusive right of taking fish from streams on or bordering the reservation; the right of taking fish "at all usual and accustomed places, in common with the citizens of the Territory"; the right to erect temporary buildings for fish curing purposes; and hunting, gathering and pasturing rights "upon open and unclaimed lands." No ambiguity attends the fundamental *activities* to which the tribe reserved rights to engage in under Article III. The treaty's unvarnished language thus reflects that the treaty parties

---

[6] In relevant part, Article II provides with respect to the land set apart for tribal occupancy:

> All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent.

12 Stat. at 952.

identified the rights that they intended to reserve for the tribe's benefit. Conspicuously absent from those activities is the right to trade free of territorial (now state) restriction.

The *Yakama Indian Nation* district court findings concerning the right-to-travel provision, if anything, underscore that the first paragraph merely "reserved [to the Yakamas] the right to travel in pursuit of traditional practices." 955 F. Supp. at 1253. Those practices included the usufructuary activities reserved under the second paragraph of Article III and one *not* reserved under the treaty – the Yakamas' pursuit of "trade and exchange" with other tribes. *Id.* at 1252. Viewed in its textual and historical contexts, therefore, the right-to-travel provision served to facilitate the exercise of certain subsistence and commercial activities, not to create *sub silentio* an entirely new reserved right immune in whole or part from off-reservation application of non-discriminatory state law.

The plain treaty language brings this dispute full circle back to the necessity of Respondent establishing "express federal law" that forecloses application of the state motor fuels tax. In that regard, the Ninth Circuit's decision in *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002), has singular relevance given its determination that the right-to-travel provision did not contain the "express exemptive language" essential to negate imposition of federal excise taxes on heavy trucks and diesel fuel with respect to off-reservation use. *Id.* at 1078-79. Although *Ramsey* involved federal,

and the second paragraph. The treaty parties unambiguously limited the exchange of promises in the first to road- or highway-related matters. The tribe accepted the Government's right to establish roads "for the public convenience" through the reservation – to which the tribe otherwise had exclusive occupancy rights under Article II[6] – but reserved (1) "the right of way, free access to the nearest public highway" from the reservation and (2) "the right, in common with citizens of the United States, to travel upon all public highways." The second paragraph then identified the other Article III rights reserved to the tribe under the treaty – *i.e.*, the exclusive right of taking fish from streams on or bordering the reservation; the right of taking fish "at all usual and accustomed places, in common with the citizens of the Territory"; the right to erect temporary buildings for fish curing purposes; and hunting, gathering and pasturing rights "upon open and unclaimed lands." No ambiguity attends the fundamental *activities* to which the tribe reserved rights to engage in under Article III. The treaty's unvarnished language thus reflects that the treaty parties

---

[6] In relevant part, Article II provides with respect to the land set apart for tribal occupancy:

> All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent.

12 Stat. at 952.

identified the rights that they intended to reserve for the tribe's benefit. Conspicuously absent from those activities is the right to trade free of territorial (now state) restriction.

The *Yakama Indian Nation* district court findings concerning the right-to-travel provision, if anything, underscore that the first paragraph merely "reserved [to the Yakamas] the right to travel in pursuit of traditional practices." 955 F. Supp. at 1253. Those practices included the usufructuary activities reserved under the second paragraph of Article III and one *not* reserved under the treaty – the Yakamas' pursuit of "trade and exchange" with other tribes. *Id.* at 1252. Viewed in its textual and historical contexts, therefore, the right-to-travel provision served to facilitate the exercise of certain subsistence and commercial activities, not to create *sub silentio* an entirely new reserved right immune in whole or part from off-reservation application of non-discriminatory state law.

The plain treaty language brings this dispute full circle back to the necessity of Respondent establishing "express federal law" that forecloses application of the state motor fuels tax. In that regard, the Ninth Circuit's decision in *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002), has singular relevance given its determination that the right-to-travel provision did not contain the "express exemptive language" essential to negate imposition of federal excise taxes on heavy trucks and diesel fuel with respect to off-reservation use. *Id.* at 1078-79. Although *Ramsey* involved federal,

not state, taxes, it nevertheless stands for the otherwise inescapable conclusion that Article III's first paragraph says nothing that precludes Washington or other States from taxing activities, other than arguably those described in the second paragraph, that occur during the tribe's or its members' use of public highways. Unless judicially expanded beyond its text, in sum, the right-to-travel provision does not embody the requisitely "express" federal limitation on a State's authority to apply its non-discriminatory laws to the Yakama Nation or its members. The Indian canons do not sanction this expansion by either the Washington Supreme Court or the Ninth Circuit. *Cf. Chickasaw Nation*, 515 U.S. at 466 ("But liberal interpretation cannot save the Tribe's claim, which founders on a clear geographical limit in the Treaty.").

III. THE SCOPE OF THE RIGHT-TO-TRAVEL PROVISION IN THE YAKAMA TREATY HAS PRACTICAL AND LEGAL SIGNIFICANCE FAR BEYOND THE CONTROVERSY HERE

This is not a parochial dispute whose outcome affects only Petitioner and Respondent or one type of tax. Superintendent Stevens alone or jointly with Joel Palmer, then Superintendent for the Oregon Territory, negotiated identically worded right-to-travel provisions shortly after the Yakama treaty with the Nez Perce Tribe, whose reservation is in Idaho, and the Flathead Tribes, whose reservation is in Montana. Treaty With the Nez Perces, June 11, 1855, art. III, 12 Stat. 957, 958 (1859); Treaty With the Flatheads

(Treaty of Hell Gate), July 16, 1855, art. III, 12 Stat. 975, 976 (1859). Both States are therefore subject to the same type of federal-state court conflict involved here. Indeed, the Washington Supreme Court's decision invites such state court litigation because of the possibility of achieving a more generous construction of the treaty provision than under extant Ninth Circuit precedent. The jurisdictional limitation in 28 U.S.C. § 1341 further ensures state court litigation when, as in this case, only a tribal member or corporate surrogate sues. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 474-75 (1975); *Navajo Tribal Util. Auth. v. Arizona Dep't of Revenue*, 608 F.2d 1228, 1324 (9th Cir. 1979); *see also Osceola v. Florida Dep't of Revenue*, 893 F.2d 1231, 1235 (11th Cir. 1990).

Yet beyond the Northwest is a broad swath of potentially affected States. The right-to-travel provision in the three treaties applies to "*all* public highways." [Emphasis added.] Literally read, the provision's geographical reach extends throughout the United States. Even a more limited construction – *e.g.*, the Yakama Nation's pre-treaty trade, usufructuary and social travel area – would encompass a huge territory. *See Yakama Indian Nation*, 955 F. Supp. at 1238 ("The Yakamas' way of life depended on goods that were not available in the immediate area; therefore, they were required to travel to the Pacific Coast, the Columbia River, the Willamette Valley, California, and the plains of Wyoming and Montana to engage in trade."). And to the extent the dispute involved application of the Nez Perce or Flathead treaty right-to-travel provision, the specter of "undertak[ing] a factual inquiry into the

intent and understanding of the parties at the time the Treaty was signed to determine the meaning of the highway right" looms. *Cree v. Waterbury*, 78 F.3d 1400, 1404 (9th Cir. 1996).

Finally, as the litigation to date over the Yakama provision reflects, the range of possibly affected taxes or fees is substantial. Aside from fuel, motor vehicle and tobacco taxes, the Washington Supreme Court's reasoning arguably captures taxes on items purchased off reservation and transported on "public highways" back to the reservation by a tribal member for commercial use or sale (or, conceivably, for personal use). States, in theory, can enact ameliorative laws that alter a tax's legal incidence and shift it to an entity with no immunity (*see* Pet. 3-4), but no discernable interest in efficient governance is served by requiring them to adjust their statutory regimes when a decision from this Court may avoid the need for, or clarify the appropriate scope of, a legislative response. There is, as well, no assurance that this species of a single State's legislative fix will eradicate the possibility for tax avoidance by tribal members. Respondent has successfully done so to this point by purchasing fuel in Oregon and using an exemption under that State's law to eliminate *any* taxation on its distribution of motor fuel. Given the centrality of effective tax administration to any government, a high measure of certainty in the rules of the road is essential so that, if required, States can develop legislative responses to such tactics. This Court should step in and provide that certainty here.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LAWRENCE G. WASDEN
Attorney General
STEVEN L. OLSEN
Chief of Civil Litigation
CLAY R. SMITH
Counsel of Record
Deputy Attorney General
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Email: clay.smith@ag.idaho.gov

Counsel for Amicus Curiae States

July 2017